

## Drug kingpin Arellano could face execution for drugs

by Greg Moran - CNS

SAN DIEGO - Kidnapping and torture. Drug smuggling and murder.

Federal prosecutors say that for 15 years Francisco Javier Arellano Felix helped direct a ruthless drug-smuggling empire that terrorized both sides of the U.S.-Mexico border, leaving scores dead in its wake.

But in a new indictment quietly unsealed May 25, the violence that was the hallmark of the Tijuana, Mexico-based cartel is not the reason why Arellano could face the death penalty.

Instead, the indictment says he is eligible for execution because of his drug smuggling - not for any one of the killings outlined in numbing litany in the 29-page indictment.

It has not yet been decided whether Arellano will face the death penalty, but it is widely expected that prosecutors will opt for that course before his trial gets under way in January.

If that occurs, he could be the first person to face execution under the federal death penalty in this district.

If he is sentenced to death as a drug kingpin, he would occupy a unique place on the federal death row.

All 53 inmates there now are facing execution for committing at least one murder, according to information compiled by the Death Penalty Information Center in Washington, D.C.

The indictment says Arellano can be executed under the drug kingpin section of the federal death penalty law, enacted in 1994. It says people can be executed if they are part of a continuing criminal enterprise that imports a certain amount of drugs and collects a certain amount of profits.

Arellano's indictment says he is responsible for smuggling more than 300 kilograms of cocaine and receiving more than \$20 million in profits in a year. Also facing the same allegations is Manuel Arturo Villareal Heredia, a top lieutenant.

Why the government elected to lay the groundwork for seeking the death penalty under this part of the law is not spelled out, and federal prosecutors did not respond to requests for comment on the new indictment.

Defense lawyers were intrigued. Saying in the indictment that Arellano could face the death penalty as a drug kingpin "is certainly unusual," said Knut Johnson, a San Diego defense lawyer.

Certainly the new indictment does not mean prosecutors will have to limit their case to drug-dealing activities, said Charles LaBella, a former federal prosecutor.

"They can introduce evidence of other aspects of it - that there were murders and he is responsible for them," LaBella said.

David Bartick, Arellano's attorney, declined to comment on the new indictment.

Prosecutors still could issue another indictment calling for his execution under one of the numerous murder sections in the federal death penalty law, legal experts said.

Still, the move to seek Arellano's death as a drug smuggler would be extraordinary.

One defense lawyer who did not want to be named said there is only one other case, in North Dakota, where the government has said someone is eligible for the death penalty under the drug-kingpin law.

Seeking execution for something other than murder in the Arellano case could present legal problems, said Shaun Martin, a law professor at the University of San Diego School of Law.

"The constitutionality of putting someone to death for importing drugs alone is very unclear," Martin said.

"If someone was ever sentenced to death purely for importing drugs as opposed to killing someone in the process of doing that, then that would be subject to a constitutional challenge."

In a landmark decision in 1977, the U.S. Supreme Court ruled that a Georgia man could not be executed by

that state after being convicted of rape. The impact of the decision largely has been to limit death sentences in the 39 states that allow capital punishment to those who commit or participate in a murder.

In recent years some states have begun to test that. Six states now have laws calling for the death penalty for certain sex crimes against children. A Louisiana man who is on that state's death row for raping a child is believed to be the only nonmurder death row prisoner in the country. California law allows the death penalty only for first-degree murders with one or more special circumstances, such as lying in wait or multiple murders.

The decision on whether to seek the death penalty is still some time away. A committee in the Department of Justice will review a recommendation by local prosecutors on whether to pursue execution, and the final decision will be made by the attorney general.

Arellano and his lieutenant, Villareal, pleaded not guilty May 29 to the charges in the new indictment, which include drug, racketeering, conspiracy and money-laundering counts.

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